Office-Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,
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NO. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), ET AL.,
Defendants-Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Plaintiffs-Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court below erred in holding that 42 U.S.C. § 1985(3) provides a remedy for injuries suffered by nonunion workers and their employer in an episode of mob violence resulting from a private conspiracy motivated by a class-based invidiously discriminatory animus.

2. Whether the court below erred in holding that animus against persons because of their nonunion associations or "outsider" status may constitute "class-based, invidiously discriminatory animus" for the purposes of 42 U.S.C. § 1985(3).

3. Whether the court below erred in holding that both the employer and his workers who were the victims of conspiratorial violence may recover under 42 U.S.C. § 1985(3) for injuries suffered as a result of that violence.

DESIGNATION OF CORPORATE RELATIONSHIPS

The A.A. Cross Construction Company, Inc., filing this Brief for Respondents in this proceeding, states that:

1. No relevant changes have occurred since its original designation of corporate relationships.
2. The A.A. Cross Construction Company, Inc. is not owned by any parent corporation.
3. The A.A. Cross Construction Company, Inc., does not have any ownership interest in any subsidiaries.
4. The A.A. Cross Construction Company, Inc. does not have any affiliates.

A.A. Cross Construction
Company, Inc.
Dated: March 15, 1983

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PAUL E. SCOTT, ET AL.,
Plaintiffs-Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1985(3) (Supp. III 1979), Rev. Stat. § 1980, provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the

premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property or account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1985(3) by two construction workers and their employer, A.A. Cross Construction Company, for injunctive relief and damages against certain unions and some of their individual members. The complaint alleged that defendants conspired to deprive plaintiffs of the equal protection of the laws and equal privileges and immunities under the

laws, and pursuant to this conspiracy, planned and executed an attack on plaintiffs causing them injury.

The following passage from the lower court's statement of background facts is added to supplement Petitioners' Statement of the Case.

> On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. . . . The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment.

Scott v. Moore, 680 F.2d 979, 983-84 (5th Cir.), *cert. granted sub nom. United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 103 S. Ct. 442 (1982) (No. 82-486).

The district court issued temporary and permanent injunctions against further violence and awarded damages to plaintiffs against eleven of the defendant unions. *Scott v. Moore*, 461 F. Supp. 224 (E.D. Tex. 1978), *aff'd in part and rev'd in part*, 640 F.2d 708 (5th Cir. 1981). On appeal, both a panel of the court of appeals and, on rehearing *en banc*, the entire court affirmed the district court judgment with respect to three of the unions, the present Petitioners.

Petitioners challenge the holding of the court below that Respondents established a cause of action under 42 U.S.C. § 1985(3). Petitioners do not challenge the holding that the Norris-Laguardia Act, 29 U.S.C. § 101-115 is inapplicable to this case or the holding that the application of § 1985(3) to the facts of this case is within the constitutional authority of Congress under the commerce clause.

SUMMARY OF ARGUMENT

In part I, we point out that the Court's conclusions in *Griffin v. Breckenridge*, 403 U.S. 88 (1972) and its analysis of § 2 of the Civil Rights Act of 1871, now 42 U.S.C. § 1985(3), are entirely correct. The Court in *Griffin* overruled *Collins v. Hardyman*, 341 U.S. 651 (1951), and concluded that § 1985(3) is applicable to *private* conspiracies where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. The elements of a § 1985(3) cause of action are (1) a conspiracy (2) for the purpose of denying equality of rights and (3) acts pursuant to the conspiracy whereby another is either (4a) "injured in his person or property" or (4b)

deprived of a "right or privilege of a citizen of the United States." 403 U.S. at 102-03. The Court also made clear in *Griffin* that the statutory question of the coverage of § 1985(3) must be determined independently of the constitutional question of the authority of Congress to reach the activity involved in a particular case. Although the complaint in *Griffin*, like the complaint in the present case, alleged violations of first amendment rights and of state law rights of personal security, constitutional authority for Congress to reach the defendants' conduct was found on the basis of the thirteenth amendment and the constitutional right of interstate travel. The constitutionality of the application of § 1985(3) to the factual situation of the present case was upheld on the basis of the commerce clause, and Petitioners do not challenge this holding. However, Petitioners assert that because the lower court found first amendment rights were infringed, Respondents can recover only if this Court now decides that the fourteenth amendment grants Congress the power to reach private conspiracies, absent any "state action" allegation. This confuses the question of the scope of § 1985(3) with the independent finding of the lower court that congressional authority to reach the conduct in this case is found in the commerce clause.

In part II, we undertake to apply the analysis in *Griffin* to the case now before this Court. There was no discussion of three of the § 1985(3) elements—the court of appeals having found the following: (1) existence of a conspiracy, (3) that there were acts done pursuant to the conspiracy whereby another (4a) was injured in his person or property. Therefore, the court's discussion focused only on whether (2) the conspiracy was for the "purpose of depriving, either directly or indirectly, any person or class

of persons of the *equal* protection of the laws, or of *equal* privileges and immunities under the laws". 42 U.S.C. § 1985(3) (emphasis added).

The court below was concerned only to determine if the second element of a § 1985(3) cause of action had been met—the motivation aspect. All discussion of the first amendment right of association was in this context only.

The fourth element of a § 1985(3) cause of action as analyzed in *Griffin* is a showing that plaintiff was either "(4a) 'injured in his person or property' or (4b) 'deprived of . . . any right or privilege of a citizen of the United States.' " 403 U.S. at 103. The question whether § 1985(3) reaches private violations of fourteenth amendment rights—that is, whether such violations constitute a deprivation of "any right or privilege of a citizen of the United States" under *Griffin's* (4b) does not arise in a case where plaintiff states a cause of action under (4a) by alleging injury to person or property. There is no need to reach the constitutional question of whether the Act will apply to injury to fourteenth amendment rights *only*, because Respondents here have alleged and shown injuries to person and property under *Griffin's* element (4a). Whether or not § 1985(3) is interpreted as remedying private violations of fourteenth amendment rights, it certainly remedies injuries to person and property resulting from mob violence motivated by the requisite animus. The lower court's discussions of associational infringements were properly confined to its discussion of element (2), the motivation requirement. There is simply no element (4b) issue to be decided in this case.

The court found that Petitioners *"sought to deny* completely the plaintiff employees' right not to associate" by

threatening and committing violent acts to require plaintiffs to "leave the area or concede to union policies and principles". *Id.* (Emphasis added). The conclusion of the court below that § 1985(3) "encompasses a conspiracy *designed to deprive* nonunion workers of the first amendment right to freely associate with one another" (*Id.* at 1004) (emphasis added) is a correct interpretation of the statute's motivation element (2) and in accord with the decisions of this and other courts.

The district court found that the purpose of the conspiracy was "to intimidate and coerce these nonunion people from working or being employed within a 'union area' ". *Scott v. Moore,* 461 F. Supp. at 230. Affirming, the court of appeals stated: "the conspiracy in this case was motivated by a prounion animus so strong that it staked its claim not merely ideologically, but geographically. The nonunion plaintiffs were repeatedly told that they were in union country and would be punished for choosing to work there nonunion". 680 F.2d at 992. Findings as to motive are "peculiarly factual issues for the trier of fact", *Pullman-Standard v. Swint,* 102 S. Ct. 1781, 1790 (1982). The findings below as to defendants' motive are supported by the record and therefore conclusive here.

Further, we show the Court that there is no standing issue raised by Petitioners. The statute itself does not place any limitation on traditional concepts of standing and the "class" modifier in element (2) does not restrict an element (4a) recovery. The Respondent, A.A. Cross Construction Company may recover for injuries suffered as a result of conspiratorial violence motivated by an animus against the nonunion associations or outsider status of his employees. The plaintiff employer was an object of this animus because

he hired nonunion, out-of-town workers and, therefore, he should be considered a member of the group toward which Petitioners' animus was directed. In any event, the plaintiff employer may recover, as the court below held, because the statute on its face, its legislative history, and this Court's decision in *Griffin* all make clear that a § 1985(3) plaintiff need not be a member of the class which is the object of the animus, only "another" injured in his person or property.

In part III, we refute Petitioners' analysis of the legislative history. Petitioners' attack on the holding of the court below that plaintiffs have established a § 1985(3) cause of action is based almost entirely on a review of the legislative history of § 2 of the 1871 Civil Rights Act. Reasserting a state action requirement explicitly rejected in or inconsistent with *Griffin*, Petitioners in essence ask the Court to reconsider and reject *Griffin's* analysis of § 1985(3).

Petitioners' review of the legislative history of the Act succeeds in showing only that the Court's reading of that history in *Griffin* is correct: the bill as introduced covered all private conspiracies violating personal or property rights; it was amended to limit the "enormous sweep of the original language" (403 U.S. at 100); and the limitation adopted was not, as Petioners contend, any form of state action requirement or exclusion of certain types of rights, but was instead the addition of a requirement of a motive to deny equality of rights. Petitioners' basic contention, that Congress did not intend § 1985(3) to reach private conspiracies to infringe rights protected against state infringement by the fourteenth amendment, is not supported but refuted by the legislative history.

ARGUMENT

I. *GRIFFIN V. BRECKENRIDGE* DEFINES THE ELEMENTS OF A CAUSE OF ACTION UNDER SECTION 1985(3)

A. Section 1985(3) Reaches Private Conspiracies

The modern law of § 1985(3) begins with this Court's decision in *Griffin v. Breckenridge,* 403 U.S. 88 (1971). In *Collins v. Hardyman,* 341 U.S. 651 (1951), the Court had in effect read into the statute a "state action" or "under color of state law" requirement, making it inapplicable to purely private conspiracies. In *Griffin,* however, the Court saw "[l]ittle reason . . . not to accord to the words of the statute their apparent meaning," and "the words of the statute," it noted, "fully encompass the conduct of private persons." 403 U.S. at 96. The Court pointed out in *Griffin* that it is easy to be misled by the similarity of the equal protection language in § 1985(3) to language in § 1 of the fourteenth amendment.[1] "Yet there is nothing inherent in the phrase [equal protection] that requires the action working the deprivation to come from the State. *See, e.g., United States v. Harris,* 106 U.S. 629, 643."[2]

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1. The fourteenth amendment, however, does not refer to the deprivation of *equal* privileges and immunities and refers only to "the privileges or immunities *of citizens of the United States.*" U.S. CONST. amend. XIV, § 1 (emphasis added).

2. *Harris* further states:

> A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by

It therefore appears that Congress intended the section to apply to "*all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." 403 U.S. at 97. That Congress intended § 1985(3) to reach private action does not mean that Congress intended to provide a federal remedy for "all tortious, conspiratorial interferences with the rights of others." 403 U.S. at 101. The legislative history of the statute and the requirement of a denial of "*equal* protection, or *equal* privileges and immunities," added by an amendment to the original bill, make clear that Congress was concerned with providing a remedy only for denials resulting from the "kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." 403 U.S. at 102.

B. The Coverage of § 1985(3) and the Constitutionality of Its Application are Separate Questions

The Court also made clear in *Griffin* that the statutory question of the coverage of § 1985(3) is separate and distinct from the constitutional question of the authority of Congress to reach conduct within that coverage in the circumstances of a given case. The constitutional authority of Congress to reach the conduct complained of in *Griffin* was found on the basis of the thirteenth amendment or the constitutional right of interstate travel. In the present case, the constitutional authority of Congress to apply § 1985(3) to the conduct involved was found by

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the commission of some offense against the laws which protect the rights of persons, as by theft, burglarly, arson, libel, assault, or murder.

the court below on the basis of the commerce clause. U.S. CONST. art. I, § 8. That finding has not been challenged by Petitioners in this Court.

C. *Griffin* Does Not Support Petitioners' Assertion of a State Action Requirement

Petitioners assert that the legislative history requires some form of state involvement before a case can be made out under 42 U.S.C. § 1985(3). Presumably, Petitioners would except from this requirement those few rights which citizens are said to enjoy against all interferences. These include the right not to be enslaved, the right to travel, and perhaps one or two others. All other rights, such as equal protection or first amendment rights, are said to require some form of state involvement. While it is unclear from the Petitioners' discussion precisely what form of state involvement is required, it would appear from their analysis of the debates that the requisite state action could take the form of negligence, maladministration, refusal to enforce, or, perhaps, a conspiracy aimed at interfering with equal protection by the state. These and other possibilities are suggested in Petitioners' Brief at p. 38, and it is nowhere made clear just which one, in their view, is a requirement under 42 U.S.C. § 1985(3).[3]

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3. Petitioners' Brief at p. 29 attempts to equate their view of the statute with Justice Stevens' concurrence in *Great American Federal Savings and Loan Association v. Novotny*, 442 U.S. 366, 382-85 (1979) (Stevens, J. concurring). Petitioners will find no comfort in Justice Stevens' views. The concurrence in *Novotny* emphatically states that "the requirement of state action, in this context, is no more than a requirement that there be a constitutional violation." State action in a constitutional sense must pass the test set out in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). None of Petitioners' suggested forms of state involvement would pass this test.

Although Petitioners' views of the requisite quantum of state involvement are apparently unsettled, a choice is unnecessary. All of Petitioners' suggested forms of state involvement were specifically raised and rejected by this Court in *Griffin v. Breckenridge*. *Griffin* considered three possible forms of state action limitation: (1) action under color of state law, (2) interference with or influence upon state authorities, and (3) popular resistance sufficient to supplant governmental authority. Each of these possibilities was considered and rejected by the Court.[4] 403 U.S. at 98-99. Thus, *Griffin* not only decided that private conspiracies, *not* acting under color of law, could be reached by § 1985(3), but also held that there was no requirement for an usurpation of, or interference with, state protection of the laws.

Petitioners appear to assert that *Griffin's* holding applies only to those few rights which are applicable to private parties outside of the fourteenth amendment. Such an assertion blatantly ignores the fact that *Griffin* was a case asserting, *inter alia*, a violation of equal protection and was decided along those lines. *See, e.g.*, 403

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4. The Court noted that the Congress that passed the Civil Rights Act of 1871 "dealt with each of these three situations in explicit terms in other parts of the same Act." 403 U.S. at 99. The first section of the Act, now 42 U.S.C. § 1983, reaches deprivations inflicted under color of state law. There is a separate clause in section 1985(3) itself that reaches conspiracies "for the purpose of preventing or hindering the constituted authorities of any State . . . from . . . securing to all persons . . . the equal protection of the laws." And section 3 of the 1871 Act dealt specifically with the situation where state authorities were rendered powerless because of "massive private lawlessness." "Given the existence of these three provisions," *Griffin* concluded, "it is almost impossible to believe that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage of one or more of them." 403 U.S. at 99.

U.S. at 97. Thus, *Griffin* itself dealt with a fourteenth amendment right.[5] Under the Petitioners' analysis, Respondents would be required to plead and prove some form of state involvement before making out the very case decided in *Griffin v. Breckenridge*.

It therefore appears that Petitioners' position is diametrically opposed to this Court's holding in *Griffin v. Breckenridge* and must be rejected for that reason alone. *Griffin* holds that the only requisites for making out a violation of § 1985(3) are a conspiracy, a class-based invidiously discriminatory animus, an act in furtherance of that conspiracy and constitutional *or* personal injuries. Petitioners' attempt to engraft a state action limitation simply cannot be squared with *Griffin's* understanding of the legislative intent.

5. Although *Griffin* addresses the right to travel and the thirteenth amendment, this discussion is germane only to the source of congressional power. It was only after deciding that the plaintiffs had stated a claim of a violation of equal protection that the Court turned to the source of congressional power to reach such private conspiracies.

II. THE COURT BELOW CORRECTLY APPLIED *GRIFFIN V. BRECKENRIDGE*

A. Petitioners Have Conspired to Deprive Respondents of the Equal Protection of the Laws

Although the court below held that plaintiffs can recover under § 1985(3) for a violation by private persons of plaintiffs' constitutional right of association, it is unnecessary to reach any constitutional issue here. Infringement of a constitutional right is not a necessary element of a § 1985(3) cause of action. Section 1985(3) provides a civil remedy for private conspiracies aimed at deprivation of the *equal* protection of the laws. *Griffin* did not hold that the deprivation must involve the violation of some other constitutional right, and neither the text of the statute nor its legislative history supports such a requirement.[6]

The elements of a § 1985(3) violation aimed at equal protection are no more and no less than those announced by this Court in *Griffin*. The statute requires only (1) a conspiracy (2) motivated by an intent to further a class-based invidiously discriminatory animus, (3) where an act is taken in furtherance of that conspiracy, and (4a) personal or property injuries are sustained *or* (4b) one is 'deprived of having and exercising any right or privilege of a citizen of the United States.' 403 U.S. at 102-03.

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6. As the principal dissenting opinion below stated, § 1985(3) is "not designed to protect constitutional rights; it is at once narrower, safeguarding equality, and broader, protecting against any conspiracy to deny equal protection of the 'laws.'" *Scott v. Moore*, 680 F.2d 979, 1012 (5th Cir. 1982) (Rubin, J. and Williams, J., dissenting).

1. Motivation—Element (2)

Griffin held that the necessary second element of a cause of action under section 1985(3), "specifying the motivation required," is an allegation that the defendants conspired " 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' " 403 U.S. at 96, 102-03. The Court did not hold that this requirement can be met only when constitutional rights are involved. On the contrary, the Court explicitly stated that "intent to deprive a person of a federal right" is *not* required by § 1985(3):

> The motivation requirement introduced by the word "equal" into the portion of § 1985(3) before us must not be confused with the test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law" articulated by the plurality opinion in *Screws v. United States*, 325 U.S. 91, 103, for prosecutions under 18 U.S.C. § 242 . . . ***The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.***

403 U.S. at 102 n.10 (emphasis added and citations omitted). Thus the necessary motivation is present when the animus behind the conspirators' actions is invidious and discriminatory. Such an animus defines and constitutes a deprivation of *equal* protection or *equal* privileges and immunities. When the first three elements of *Griffin* are met, the fourth element—the damage element—allows for recovery of damages to persons or property *or* for the deprivation of the rights of citizenship. However nothing in the statute, or in *Griffin*, requires the actual deprivation

of a constitutional right as part of the motivational element of § 1985(3).

The Court in *Griffin* illustrated a private deprivation of the equal protection of the laws, *citing United States v. Harris,* 106 U.S. 629, 643 (1883), where the Court stated:

> The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglarly, arson, libel, assault or murder.

403 U.S. at 97. In *Harris,* the Court dealt with § 5519 of the Revised Statutes (*repealed,* 35 Stat. 1154 (1909)), identical to § 1985(3) except that it provided a criminal penalty. The Court held in *Harris* that § 5519 was intended to reach private action. As an integral part of this holding, the Court concluded that the section's coverage was not limited to deprivations of constitutional rights. In its attempt to find a constitutional basis for § 5519, the Court discussed separately the authority derived by Congress from the fourteenth amendment, the thirteenth amendment, and the privileges and immunities clause of article IV, § 2. In each of these discussions, the Court interpreted § 5519 as applicable to deprivations of rights under state laws. The "gravamen of the charge against the accused is," the Court found, "that they conspired to deprive certain citizens . . . of the equal protection accorded them by the laws of Tennessee", by beating and committing other acts of violence against them. 106 U.S. at 643. The Court held that under § 5519, "private persons are liable to punishment for conspiring to deprive any one of the equal protection of the *laws enacted by*

the State," and that the indictment would therefore be good under § 5519 if it were constitutional. Because the Act was directed "exclusively against the action of private persons," however, the Court ruled that it exceeded the power of Congress to enforce the fourteenth amendment. *Id.* at 639-40.

Harris was decided only twelve years after the passage of the Civil Rights Act of 1871. *Griffin* relied upon *Harris* to show that § 1985(3) was also applicable to such private conspiracies. The legislative history is fully in accord with the position taken in *Griffin* and *Harris.* Congress was concerned to prevent the denial of equality—the injuring of another because of animus against a despised class. The equal protection moiety of § 1985(3) addresses itself to equality with respect to state rights. It becomes operational when violence is directed against persons because of their perceived membership in a group.

> If, in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the state of Florida within a few days where a man lost his life for that reason) then this section could reach it.

GLOBE, p. 567 (Sen. Edmunds).

As discussed more fully *infra,* the original version of § 1985(3) was amended because it implicated state created rights. However, "[t]he explanations of the added language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not be imposed for purely private

conspiracies." 403 U.S. at 100. In its interpretation of the limiting amendment as adding a motivation requirement, *Griffin* relied on Representative Willard's explanation. 403 U.S. at 100. Willard objected to the original version as granting the United States "original jurisdiction of all offenses against life, property, or person, although such offenses might be committed within the limits of a State. . . ." GLOBE, App. p. 188. The limiting amendment "obviated what I regarded as a fatal objection to the section . . . by providing that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws. . . ." *Id. See also* GLOBE, p. 478 (Rep. Shellabarger) (cited at 403 U.S. at 100).

Thus, the limiting amendment imposes the element of an intent to deny equality, which *Griffin* interpreted to mean a requirement of invidiously discriminatory animus. If such animus is found, the remedy provided in the statute would be available in cases involving conspiracies to murder, assault and commit battery on persons or to damage property. These were precisely the injuries which led to the passage of the Act. The purpose of the limiting amendment was *not* to remove these personal injuries from the Act's coverage, any more than it was to remove private conspiracies, but only to confine that coverage to cases where the requisite animus for the infliction of injuries could be shown.[7] Indeed, it was only because the statute would otherwise reach all injuries to persons and property that the invidiously discriminatory motivation

7. *See* Forward, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 99-100 (1971). Under *Griffin*, once the requisite invidiously discriminatory animus is shown, private tortious acts such as assaults constitute a basis for liability under § 1985(3) whether or not the section can be interpreted to reach private violations of first amendment rights.

requirement was injected. There would have been no basis for fear of creation of "a general federal tort law" if § 1985(3) were designed to reach only conspiracies denying constitutional rights.

2. Injury—Elements (4a) and (4b)

Section 1985(3) presents plaintiffs with two sets of alternatives. The defendant's motivation may be either for the purpose of depriving any person (2a) of the equal protection of the laws *or* (2b) of equal privileges and immunities under the laws. In either case, damages may be awarded for (4a) injury to person or property *or* (4b) deprivation of having and exercising any right or privilege of a citizen of the United States.

The present case involves recovery for damages under (4a). Only when the analysis reaches element (4b) does the question arise whether a private deprivation of a fourteenth amendment right meets the requirement that another be "deprived of . . . any right or privilege of a citizen of the United States." Only if the plaintiff alleges no (4a) injury to person or property and relies solely on an alleged deprivation of a citizenship right must the court decide whether § 1985(3) reaches private violations of fourteenth amendment rights. Under either (2a) or (2b), the requirement is only that there be animus in relation to rights. The conspiracy must be animated by hostility towards the exercise or enjoyment of rights. No *deprivation* need exist, and therefore no constitutional rights are directly implicated. Because the present case falls within (4a), it is not necessary to reach any constitutional question in order to affirm the judgment below.[8]

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8. See Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era*

In the present case, Petitioners held a deeply-rooted regional prejudice against "outsider" workers who had contracted for employment on an open shop basis. This animus was so strong as to motivate Petitioners to conspire against Respondents, and in furtherance of this conspiracy, they inflicted personal and property injury on Respondents in violation of the civil and criminal laws of Texas. *Scott v. Moore,* 461 F. Supp. 224, 228 (E.D. Tex. 1978). No more is required to state a cause of action under § 1985(3).

Therefore, Respondents' recovery on this cause of action does not conflict with the holdings of either *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972) or *Great American Savings and Loan Association v. Novotny,* 442 U.S. 366 (1979) relied on by the Petitioners. These decisions involved allegations falling within *Griffin's* element (4b)—deprivation of a "right or privilege of a citizen of the United States."

In *Dombrowski,* the claim of injury was based solely on defendants' refusal to rent office space to plaintiff. Because no injury to his person or property was presented under *Griffin's* element (4a), the plaintiff could claim only a deprivation of a "right or privilege of a citizen of the United States" under (4b). Plaintiff was therefore contending that the refusal to rent space to him violated his fourteenth amendment rights. Recovery on this ground

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Amendments, 74 COLUM. L. REV. 449, 497 (1974). By focusing the motivation inquiry on the conspirators' invidiously discriminatory animus instead of on a specific intention to deprive the victim of his rights, *Griffin* equated invidiously discriminatory animus with an intent to deprive the victim of equal protection. A § 1985(3) cause of action is established, therefore, by showing the required animus and the resulting injury required by *Griffin's* elements (4a) or (4b).

would have required holding that § 1985(3) extended fourteenth amendment guarantees to purely private action, a holding the *Dombrowski* court refused to make. 459 F.2d at 196.

Similarly, the plaintiff in *Novotny* suffered no injury to person or property that would bring his section 1985 (3) action within (4a). He could recover only if "right or privilege of a citizen of the United States" under (4b) included the right, created by Title VII of the Civil Rights Act of 1964, to be free from discrimination in employment. The Court held that Title VII rights are not within the scope of (4b) and are to be enforced only through the remedial framework created by Title VII. 442 U.S. at 378.

In the present case, Respondents have alleged and proven (1) the existence of a conspiracy (2a) to deprive them of the equal protection of the laws, *i.e.* that Petitioners conspired pursuant to a class-based invidiously discriminatory animus. Petitioners (3) did and caused to be done acts in furtherance of this conspiracy which proximately caused Respondents' (4a) damages to person and property. Thus, the present case leaves open the question of whether state action is required for deprivations of fourteenth amendment rights under § 1985(3). Respondents make no claim under element (4b). The motivational element (2a or 2b) requires animus, not the deprivation of a constitutional right.

Whether or not (4b) of the Act should be interpreted to provide a remedy for denials by private persons of fourteenth amendment rights or rights created by federal laws, the Act should certainly be held to reach a factual situation nearly identical to that with which its framers

were concerned: attacking the persons and property of citizens because of their membership in a despised class. The present case involves the very type of activity which the Civil Rights Act of 1871 was designed to reach under (4a). The personal and property injuries inflicted upon Respondents in this case are precisely like those described in the legislative history of the Act. *Griffin* recognized that the Act was passed in response to these attacks as a "frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State." 403 U.S. at 101. Like *Griffin*, the present case involves conduct "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." 403 U.S. at 103.

B. Petitioners Have Conspired to Deprive Respondents of Equal Privileges and Immunities

1. Motivation and Injury

A conspiracy aimed at a deprivation of equal privileges and immunities (element 2b) requires a somewhat different approach. Here, as more fully discussed *infra*, the Congress felt it could act directly. The controversy which gave rise to the limiting amendment concerned granting a federal remedy for *state* crimes. In contrast, there was never a doubt that Congress could provide redress for violations of the rights of *national* citizenship. Nevertheless, Congress chose to frame the statute in terms of "*equal* privileges and immunities". Thus, *Griffin* was perfectly justified in holding that the use of the word "equal" in that context had the same effect as in the *equal* protec-

tion context, *i.e.*, it requires class-based invidiously discriminatory animus. However, since Congress felt that it could reach these particular conspiracies in a more straightforward fashion, the animus involved is properly construed as one in relation to the exercise of these fundamental liberties.[9] Thus, if violence is directed against a group because of its perceived expression, association, etc., such violence would properly be the subject of a § 1985(3) action. Since Respondents have proven that the Petitioners (1) conspired together; (2b) in order to further a class-based invidiously discriminatory animus directed against Respondents' association; (3) that the Petitioners acted on the basis of that conspiracy with Klan-like brutality, and that; (4a) Respondents were injured in their person and property, the judgment of the court below must be affirmed.

2. First Amendment Rights

It is well settled, as the court below noted, that "the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment"[10] (680 F.2d at 988) and "that association for the purposes of advancing economic, as well as political or religious, interests falls within the protection of the first amendment." *Id.* at 990. *E.g.*, *Abood v. Detroit*

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9. At the same time, and by the same reasoning, there need not be any specific intent to deprive a person of specific privileges and immunities. *Griffin* noted that the insertion of the word "equal" imposes a requirement of invidiously discriminatory animus but also removes any question of specific intent.

10. *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3423 (1982); *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977); *Healy v. James*, 408 U.S. 169, 181 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971).

Board of Education, 431 U.S. 209 (1977); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *Thomas v. Collins,* 323 U.S. 516 (1945).

In the present case defendants' conspiratorial actions flowed from an animus in relation to plaintiffs' associational interests. The court below recognized that, "the corollary of the right to associate to advance economic interests is the right not to associate"; " 'that [t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.' " 680 F.2d at 990, *quoting Abood v. Detroit Board of Education, supra. Abood* thus recognized that those choosing nonunion status enjoyed First Amendment associational rights, although those rights are of course not unlimited. The conspiracy in the present case sought to accomplish what was forbidden by *Abood.* As the court below held, the conspiracy "sought to deny completely the plaintiff employees' right not to associate" by, as the district court found, "assault[ing] the plaintiffs and 'threaten[ing] to continue violent actions if the nonunion workers did not leave the area or concede to union policies and principles.' " 680 F.2d at 990, *quoting Scott v. Moore,* 461 F. Supp. at 227. Petitioners' characterization of the present case as an attempt "to police economic competition in the private sector" (Pet. Br. 42) ignores both the importance of the associational interests involved and the seriousness of the violence.

In *Smith v. Arkansas State Highway Employees,* 441 U.S. 463, 466 (1979), cited by Petitioners, the Court ruled that the State Highway Commission had not vio-

lated any first amendment rights since, "[f]ar from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union." *Id.* That the defendant did not violate plaintiffs' first amendment rights in *Smith* by simply ignoring plaintiffs is hardly relevant to the situation of mob violence in the present case. The actual relevance of the *Smith* opinion to this case lies in its recognition that first amendment associational rights would be impaired by efforts to hinder workers from "joining together in a union, or from persuading others to do so, or from advocating any particular ideas." 441 U.S. at 465.

In the present case, employee plaintiffs did not claim that they had a constitutional right to work for any employer, either union or nonunion. They claimed the right to associate with other nonunion workers—on the job, in the pool hall, and on the street—free from conspiratorial violence. This is the associational right recognized by the court below. The court's holding that "the statute encompasses a conspiracy designed to deprive nonunion workers of the first amendment right to freely associate with one another" (680 F.2d at 1004) is a correct interpretation of the statute and in accordance with the decisions of this Court.

It must be emphasized that this is an element (2b) finding and goes to the motivational aspect of section 1985(3), *i.e.*, animus in relation to the rights of national citizenship. Petitioners consistently confuse this requirement with a claim for damages under element (4b) which is not involved in this case. The motivational aspect

of the Act does not by itself require deprivation of a constitutional right.

C. The Finding That Petitioners Were Motivated By A Class-Based, Invidiously Discriminatory Animus Is Correct

1. The question of appropriate class is the question of appropriate animus

Much has been written about the class basis of § 1985 (3), and the need for an "appropriate class". The key to a proper understanding of this phrase is that "class-based" modifies the word "animus". Thus the class basis is a part of the motivational aspect of § 1985(3). Since the class exists only as part of the defendants' animus, Petitioners' objections must relate to the appropriateness of the animus. There is no particular magic, nor any particular difficulty, in defining "appropriate classes" for purposes of § 1985(3). Any class is appropriate so long as plaintiffs can prove the requisite invidiously discriminatory animus.

The court below correctly ruled that "the nonunion employees in this case comprised the kind of class Congress intended to protect." 680 F.2d at 994. The court reached this conclusion, not because the class was somehow "appropriate", but because the plaintiffs had been exposed to the requisite animus.

> Although regional hostility is not an intrinsic class characteristic, those who would exercise a false territorial sovereignty by fomenting hostility against persons antagonistic to their aims *create a class* in need of federal protection of precisely the sort Congress intended to protect.

Id. (Emphasis Added.) If more "appropriateness" is needed, it is supplied by reference to legislative history. The court found that "the position of these nonunion employees in Jefferson County, Texas is markedly similar to that of the Republicans in the South" at the time of the passage of the 1871 Act. *Id.* The "pervasive regional hostility" "ignited" by the "presence of these nonunion employees in 'union country' " was very similar to the hostility against Republicans in the South during the Reconstruction era. *Id.* An Act designed to reach conspiracies based on regional hostility against Republicans, must surely also reach conspiracies based on regional hostility against nonunion workers and their association interests.

2. The lower court's finding of appropriate animus is not clearly erroneous

The findings discussed above are findings of fact with respect to motivation. This Court has only recently ruled in *Pullman-Standard v. Swint,* 102 S. Ct. 1781, 1790 (1982) that " 'findings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact," quoting *United States v. Yellow Cab Co.,* 338 U.S. 338, 341 (1949). The findings of the trial court as to the discriminatory intent with which defendants acted are fully supported by the record in this case.

Petitioners do not question the accuracy of any of the factual findings below. Cross's practice of hiring workers from outside the Port Arthur community had "provoked an antipathetic response from some segments of the Port Arthur community." "Local residents had confronted Cross employees at a local tavern and pool hall . . .

promising to make Cross 'go union', and occasionally warning of trouble if Cross did not cease hiring nonunion laborers." Cross was told that he would be "hurt . . . bad," threatened with the burning of "that big rig of yours," and warned that because " 'this is union country,' . . . if he persisted in using nonunion labor it was 'going to cost [him] a million dollars.' " The "citizens protest" to be staged at the construction site was to protest the hiring of nonunion labor and the "policy of hiring employees from outside the Port Arthur community."[11] 680 F.2d at 983. Immediately before the attack, plaintiff Scott was told by a member of the mob "Man, you all have got to be crazy . . . this is a union town." *Id.* at 984.

In fact, such animus against nonunion and out-of-town workers was actually conceded by Petitioners in the courts below. Petitioners' brief in the court of appeals stated:

> Port Arthur, Texas is one corner of a community generally referred to as the "Golden Triangle". . . . [T]he Golden Triangle area is peculiar in terms of its socio-economic structure. . . . Generally there are large numbers of working class people concentrated in the area and these workers are highly unionized. The general citizenry of the community tends to align itself on union/nonunion lines, and labor relations is always a sensitive issue in the Golden Triangle often capturing the front page of the local newspapers.

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11. At the hearing on plaintiffs' application for a temporary restraining order, the Sheriff testified: "[I]t has been our experience that the people who would be interested in inflicting harm upon these workers would make investigations such as license plates on cars and find out where they live . . . and in certain ways coerce or otherwise commit actual violence upon these people or their property away from the jobsite." Temporary Restraining Order Transcript, p. 12 (R. 34).

Original Brief of Laborers and Boilermakers to the Fifth Circuit, pp. 3-4. Petitioners' counsel stated at the trial:

> I think the evidence, your Honor, will show that what happened here is something indicative of this area we live in, and that is—not indicative of it, but arises from the fact the labor organizations are strong in this area and when outside contractors come into the area, employing people from outside the state . . . men working on jobs in the area here hear about it, they ask their unions . . . they ask their officials "do we have people working for them" . . .

Trial Transcript pp. 20-21 (R. 591-92), Opening Statement of Mr. Martin Dies. Petitioners' counsel also referred to "unrest in the community with respect to Cross Construction Co. and there was talk of some sort of citizens' protest . . . The rumor was apparently very widespread and . . . had to do with the use of out of town labor by Cross Construction. . . ." Trial Transcript, pp. 235-36 (R. 806-07), Closing Argument of Mr. William Wheat.

On the basis of the facts adduced at trial and the factual concessions of Petitioners, it simply cannot be said that the factual findings with respect to animus are clearly erroneous.

3. The lower court's interpretation of 42 U.S.C. § 1985(3) does not create a general federal tort law

As *Griffin* observed, "that the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others". 403 U.S. at 101. But very few tortious conspiracies stem from an invidiously

discriminatory motivation. The starting point, recognized in *Griffin*, is to ascertain what the framers of the Act perceived its scope to be.

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one [from] getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

GLOBE, p. 567 (Sen. Edmunds).

Cases holding that no class-based animus was shown have involved purely individual disputes. In such cases, there can be no showing of "prejudice against a class *qua* class," no "general prejudice which transcends the immediate dispute." *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 748 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).[12] Both *Silkwood* and *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980), cited by Petitioners as in conflict with the decision below, in fact state and apply this criterion—the same criterion stated and applied by the court below. Petitioners' conspiracy was motivated, not by malice against the Respondents as individuals, but by an ideological or political antipathy for the association of nonunion workers and by resentment against outsiders

12. See also *Taylor v. Brighton*, 616 F.2d 256 (6th Cir. 1980); *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979); *Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978); *Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975).

coming into the area to work. The animus involved here did not arise as a result of Respondents' conduct, but existed prior to that conduct. It was only because of its prior existence that Petitioners conspired to victimize Respondents.

The distinction between personal grudges and class-based invidiously discriminatory animus is not always clear. The requisite level of animus is a function both of degree and extent. The animus is certainly of a sufficient degree if it leads to violence. It may be recalled that in its unamended version, the Act made specific mention of common law crimes of violence such as arson, murder, and the like. The reference to these crimes was deleted in order to appease those legislators who felt that Congress had no business enforcing the criminal laws of states. Nevertheless, there is no indication that the amendment was intended to broaden the scope of the statute to include non-violent conspiracies. The existence of violence or common law crime remains an excellent indicator that the requisite degree of animus exists.

The extent of the animus is also an important indicator. Certainly, it was important to the 42d Congress in to ways. First, the Congress was concerned that Klan activity, because it was regional in character, opposed the policy of national reintegration embodied in the Reconstruction acts. Second, the Klan stood for an old economic order which the infusion of free blacks and immigrants was disrupting. Thus the animus with which the framers were concerned had geographical and cultural extent.[13] The

13. Senator Frelinghausen attacked "petty, tribal sovereignties" which "affected the social and business interests of the people". GLOBE, p. 499. He expressed the views of those concerned about ". . . little principalities surrounded by walls of brass [which] wrap

scope of the animus is therefore a good indicator that it is not, in Senator Edmunds' phrase, a private barn burning. Ultimately, these are matters of degree, and are properly left to the finder of fact. The question of animus, as previously noted, is a question of "the design, motive and intent with which men act". *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). Nevertheless, if guidelines are appropriate, a conspiracy founded in an animus so pervasive as to amount to a regional and cultural prejudice, and so strong as to lead to organized violence, is surely within the scope of the Act.

D. The Present Case Presents No Standing Issue

Section 1985(3) provides that when there is proven a conspiracy to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" and an act done "in furtherance of the object of such conspiracy, whereby *another* is injured in his person or property, or deprived of . . . any right or privilege . . . *the party so injured or deprived* may have an action for the recovery of damages, occasioned by such injury or deprivation. . . ." (Emphasis added.) The statutory language leaves no doubt that the judgment of the court is correct. The validity of that holding is confirmed by Senator Edmunds' statement that "[t]his section gives a civil action to anybody who may be injured by the conspiracy." GLOBE, p. 568. Petitioners' position apparently relies on a purported requirement the plaintiffs be members of a "class".

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themselves up in their fancied grandeur and exclude half of the country from their borders by proscribing free speech, free thought and free action . . ." GLOBE, p. 500.

As discussed *supra*, the class concept relates only to the motivational requirement and has no relevance to standing. Notably, the statute expressly places "person" and "class of persons" in the disjunctive.

Nothing in *Griffin* suggests any special standing limitation. In fact, *Griffin* clearly establishes the contrary, since the plaintiffs in *Griffin* were twice removed from the target of the conspiracy. The plaintiffs in *Griffin* were merely passengers in an automobile owned and operated by the target of the conspiracy, R. G. Grady. Defendants believed Grady was a civil rights worker, although this belief was mistaken. 403 U.S. at 90. This Court held that plaintiffs were entitled to recover nonetheless, because "the petitioners—*whether or not the nonparty Grady was the main or only target of the conspiracy*—allege personal injury resulting from" the acts done in furtherance of the conspiracy. *Id.* at 103 (emphasis added).

In his dissent in *Great American Federal Savings and Loan Association v. Novotny*, 442 U.S. 366, 385 (1979), Justice White, relying on *Griffin*, concluded that persons injured by the private conspiracies proscribed by § 1985 (3) can redress their injuries under that statute "quite apart from any redress by those who are the object of the conspiracy. *Griffin v. Breckenridge*, 403 U.S. 88, 103." 442 U.S. at 391. The *Novotny* majority expressed no disagreement with Justice White on this point.[14]

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14. There is no merit in Petitioners' contention that Justice White's interpretation is implicitly rejected by *Novotny's* statement that section 1985(3) "is a purely remedial statute." 442 U.S. at 376. The remedial nature of the statute constitutes no ground for distinguishing between those injured persons who are and those who are not members of the class which is the object of the discriminatory animus. All

The Respondent employer's recovery is also supported by decisions under statutes related to § 1985(3), permitting recovery by plaintiffs who were not members of the class the statute was designed to protect. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), plaintiff, a white, had his membership share in a recreational facility revoked because he had assigned it to a black. Plaintiff brought suit for an injunction and damages under 42 U.S.C. § 1982, which provides that all citizens "shall have the same right . . . as is enjoyed by white citizens" in regard to real and personal property. Although the plaintiff was not a member of the class protected by § 1982, the Court upheld his action.[15]

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), involved a suit by a white school teacher under 42 U.S.C. § 1983 for damages resulting from the denial "under color of law" of the right not to be discriminated against on the basis of race. The Court upheld her right to bring a section 1983 action based on a restaurant's refusal to serve her when she was with her black students.[16]

There can be no justification for reaching a different result in the present case where the statute explicitly provides for recovery by anyone injured as a result of the proscribed conspiracy.

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plaintiffs seeking recovery under section 1985(3) must show is an injury to person or property.

15. *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949), reached the same result under 42 U.S.C. § 1981, which gives all persons the same contract rights "as enjoyed by white citizens." Accord *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

16. *Warth v. Seldin*, 422 U.S. 490 (1975), relied on by petitioners, did not hold to the contrary. The Court found that plaintiffs had failed to allege injury proximately caused by defendants' actions.

III. PETITIONERS' HISTORICAL ANALYSIS IS INCORRECT

A. Petitioners Fail to Distinguish Between Protection of the Laws and Privileges and Immunities

Although incorrect in their analysis, Petitioners do appear to recognize that any interpretation of § 1985(3) must be based on congressional intent. The correct approach to this statute, as with all other statutes, is to determine what Congress sought to accomplish, rather than to debate the merit of its constitutional scholarship.

1. Privileges and Immunities

Petitioners attempt to show that there was considerable controversy surrounding the necessity for, or requisite level of, state involvement. Again, Petitioners are perfectly correct in pointing this out. Where Petitioners go wrong is in ascribing this concern to the entire subject matter of the Act. The concern with respect to state action was restricted to what might loosely be described as "the protection of the laws"—that is, personal security rights created by state law.[17] The matter arose in the context of equal protection. It was assumed by virtually

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17. There is considerable confusion in the nomenclature used by the legislators. Some believed that the privileges and immunities of national citizenship included these same personal security rights. Others clearly distinguished the privileges and immunities of *national* citizenship from those of *state* citizenship and referred to *state* privileges and immunities as "protection under the laws." For clarity, we will use the term "privileges and immunities" to apply only to national citizenship rights. The debate, discussed *infra*, centered on the question of whether "equal protection" was a federal right separate from, although dependent on, state created rights.

every speaker, and probably by almost every congressman, that rights of national citizenship, including those associated with the first amendment, were personal rights belonging to every citizen which could be enforced by the federal government against private parties irrespective of the actions of states.

One example of this distinction is found in the very speech by Representative Garfield upon which Petitioners place so much reliance. Garfield carefully distinguishes between the privileges and immunities of national citizenship and the privileges and immunities of state citizenship. GLOBE App. p. 152-53. He finds guarantees of life, liberty, and property to be attributes of state citizenship which cannot be addressed by the federal government, absent some evidence of state nonfeasance. However, as to the attributes of national citizenship, he states that, "it is undoubtedly within the power of Congress to provide by law for the punishment of all persons, official or private, who shall invade these rights, and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment." GLOBE, App., p. 153. He quotes in full, and with approval, § 6 of the Act of May 21, 1870, which he supported.[18] Garfield had no argument with the bill so far as it protected rights which did not depend upon the states for their creation.

This distinction appears to have been critical to all of the moderate Republicans. There is no other way to harmonize their support of § 6 of the 1870 Act with their partial opposition to § 1985(3) before amendment. For

18. This section is a criminal provision which, for all practical purposes, duplicates the language of § 1985(3) but omits any reference to equal protection, and hence to rights derived from the states. The Act is codified at 18 U.S.C. § 241.

example, Representatives Wilson of Indiana states emphatically that the privileges and immunities of American citizens are citizenship rights, and not mere limitations on the states. He has no difficulty with providing a civil federal remedy for their violation by private persons. Only then does he turn to the question of equal protection. Here, in the passage cited by the Petitioners, he feels the need for some form of state involvement. GLOBE, pp. 481-83. Indeed, Wilson has no quarrel at all with § 2 of the Act. The remarks quoted by Petitioners refer to § 3. Senator Frelinghausen similarly notes the distinction between federal and state citizenship. He sees no problem with congressional enforcement of the fundamental privileges and immunities of national citizenship. His difficulties are with the bill as it relates to usurpation of state criminal jurisdiction. GLOBE, pp. 499-502. (*See also* sentiments of Representative Pratt, GLOBE, pp. 505-06.)

Perhaps the clearest exposition of the distinction is found in the speech of Representative Cook. GLOBE, pp. 485-86. Petitioners correctly state that Cook expressed the view that the original draft of § 2 "went too far in legislating on matters within the exclusive province of the states". What Petitioners fail to state is that Cook and others expressing similar sentiments, did not regard the privileges and immunities of citizens as state matters. On the contrary, Cook states that Congress may protect every right secured by the Constitution and "any act which obstructs the operation of the Constitution of the United States so far as it affects his right, is within the constitutional power of Congress to remedy." GLOBE, p. 485. Somewhat later in the debates, he remarked that any conspiracy against a federal right is a federal prob-

lem. GLOBE, p. 511. Cook's objection went to congressional attempts to regulate the protection of life and property or to punish violations of state law, both of which he regarded as within the states' primary jurisdiction. GLOBE, pp. 485-86. Similarly, Representative Burchard's objection before amendment was that congressional power could not reach into the states to punish robbery, mayhem, etc. He had no objection to federal jurisdiction to protect federal rights. GLOBE App., pp. 313-14. *See also*, GLOBE, pp. 575-77 (Sen. Trumball); GLOBE App. p. 251 (Sen. Morton); GLOBE, p. 822 (Sen. Thurman). Almost all Republicans, moderates and radicals alike, were agreed that Congress had power to create a civil remedy for private violations of national privileges and immunities.

It must be emphasized that there was no attempt to distinguish between state action as an element of the cause of action, and state action as an element of a constitutional violation.[19] It was assumed that the privileges and immunities of national citizenship were personal guarantees which could be violated by private parties as well as the state. *See, e.g.*, GLOBE, p. 448 (Rep. Butler); GLOBE, p. 481 (Rep. Wilson); GLOBE, p. 486 (Rep. Cook); GLOBE, App. p. 46 (Rep. Kerr); GLOBE, p. 505 (Rep. Pratt). Their reasoning was that the privileges and immunities of national citizenship were granted by the first clause of the fourteenth amendment which granted

19. The legislative history does not support Petitioners' distinction between private conspiracies interfering with rights protected by the fourteenth amendment and those interfering with other rights. The legislators thought that the whole purpose of the Act was to protect rights created by the fourteenth amendment, with, as *Griffin* held, some sections addressed to state action and others to private action.

national citizenship. The granting of national citizenship necessarily granted the privileges and immunities of that citizenship, which could be protected against all the world by federal legislation. GLOBE, pp. 375-76 (Rep. Lowe); GLOBE, p. 499-500 (Sen. Frelinghausen); GLOBE, pp. 691-692 (Sen. Edmunds); GLOBE, App. p. 85 (Rep. Bingham). The privileges and immunities referred to were not created by the prohibitory clause of § 1 of the fourteenth amendment, but were derived from fundamental or prior law. GLOBE, p. 692 (Sen. Edmunds); GLOBE, p. 370 (Rep. Monroe). Thus, at least with regard to *national* privileges and immunities, there is no basis for Petitioners' purported distinction between the ability to reach private action, and state action as an element of a constitutional violation.

2. Equal Protection

Conspiracies to deprive persons of the equal protection of the laws presented different problems. This was the essence of Representative Garfield's objection. Garfield felt that § 1 of the fourteenth amendment only affected national citizenship by clearing up residual doubts created by *Dred Scott v. Sandford*, 60 U.S. 393 (1857). He felt that basic federal rights had always been part of the privileges and immunities of national citizenship, and thus enforceable against private parties. His objection related to equal protection or to the protection of privileges or immunities relating to personal and property rights. These he regarded as state created rights.

Two approaches were taken to this problem. The radicals did not believe a problem existed. *See, e.g.*, GLOBE, App., pp. 251-53 (Rep. Morton); GLOBE, p. 568 (Sen.

Edmunds); GLOBE, App., pp. 82-86) (Rep. Bingham); GLOBE App., p. 141 (Rep. Shanks). The moderate minority believed some form of state involvement was required. However, even this small group was far from homogeneous. Their opinions on the requisite level of state involvement ran the entire spectrum of possible views: insistence on formal legislative enactment in order to satisfy the fourteenth amendment, GLOBE, App. 208 (Rep. Blair); systematic neglect or malfeasance, GLOBE, p. 459 (Rep. Coburn); a simple "lack of power or inclination", GLOBE, p. 428 (Rep. Beatty); a mere failure to act on the part of the state, GLOBE, p. 482-83 (Rep. Wilson); GLOBE, p. 501 (Sen. Frelinghausen); or even lack of success in fulfilling an affirmative duty to act to promote personal liberties, GLOBE, p. 335 (Rep. Hoar); GLOBE, p. 429 (Rep. Beatty). Indeed, several legislators felt that the "state" for equal protection purposes would include the community. Thus the citizenry could deny equal protection by conspiracies. GLOBE, App. p. 182 (Rep. Mercur); GLOBE, App. p. 80 (Rep. Perry).

The alternative, and far more consistent view of the bill was that it should punish not private violence, but rather animus in relation to federal rights. This was clearly the view of Representative Shellabarger, who not only sponsored the bill, but introduced the amendment:

> The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* in effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.

GLOBE, p. 478 (Rep. Shellabarger). Earlier in the debates, when Representative Hawley objected that the original version of § 2 addressed itself to state crimes, Shellabarger responded that the crime itself was not to be punished, but that the bill was aimed at the conspiracy as it related to federal rights and was therefore clearly within federal jurisdiction. Thus, it was stressed that the crimes involved were not ordinary crimes but those organized and motivated by an animus directed at rights of national citizenship. GLOBE, pp. 412-14 (Rep. Roberts); GLOBE, App. p. 79 (Rep. Perry). This position seems to have been the essence of the compromise amendment. Where the animus was directed against *equal enjoyment* of the rights of persons and property, a federal matter of equal protection was established.

This is precisely the view taken by this Court in *Griffin* after a lengthy discussion of this same legislative history. 403 U.S. at 98-102. As *Griffin* held, the compromise was that "the conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102 (footnote omitted). Thus *Griffin* correctly presents the legislative intent. The radicals gave up direct federal protection of life and property. The moderates gave up their insistence on state action. A fair synthesis of the compromise position is precisely that stated in *Griffin*. The Act is directed against a certain kind of conspiracy, one motivated by a "class-based, invidiously discriminatory animus." *Id.* A conspiracy, in other words, which acts on the principle that one group is inherently less deserving than another—this is the essence of "equal" protection. *Harris v. McRae*, 448 U.S. 297, 324 (1981).

B. "Associational Rights in a Commercial Context Were Close to the Core of the Coverage Intended by Congress"

Petitioners cannot seriously question that association was considered part of the privileges and immunities of citizenship. If there is one principle in the history of the Ku Klux Klan Act which is undisputed, it is the desire of Congress to put down the violence of the Klan. Almost every legislator who addressed the topic insisted that some action was necessary to put down violent *private* conspiracies and to promote and protect the association and expression of Republicans in the South. *See, e.g.*, GLOBE, p. 484 (Rep. Wilson); GLOBE, p. 487 (Rep. Tyner); GLOBE, pp. 658-59 (Sen. Stewart); GLOBE, p. 157 (Sen. Sherman); GLOBE, p. 517 (Rep. Shellabarger); GLOBE, p. 686 (Sen. Shurz); GLOBE, p. 412-13 (Rep. Roberts); GLOBE, p. 394 (Rep. Rainey); GLOBE, p. 457 (Rep. Coburn); GLOBE, p. 438 (Rep. Cobb); GLOBE, p. 441 (Rep. Butler); GLOBE, p. 375-76 (Rep. Lowe); GLOBE, p. 504 (Sen. Pratt).

The Republicans in need of congressional protection fell into two general classes: blacks and northern white immigrants. As a result, two subsidiary types of animus were considered by Congress: race and economic animus. The independent significance of race in the passage of the Ku Klux Klan Act is widely understood. The importance of the Act for economic groups is equally clear in this historical context and, like race, economic animus has independent significance. White northern immigrants, like the civil rights workers in *Griffin*, were regarded as troublemakers coming into the territory to take over local institutions, both politically and economically. Represen-

tative Swann and other opponents felt the real issue was that of northern carpetbaggers, and the race issue was merely a front for northern domination. GLOBE, p. 363. *See also*, GLOBE, pp. 354-55 (Rep. Beck); GLOBE, p. 364 (Rep. Arthur); GLOBE, p. 599 (Sen. Saulsbury).

Proponents of the bill stressed the need to protect "men who have gone to the South from other States in the lawful harmless pursuit of their proper vocations." GLOBE, p. 653 (Sen. Osborne). Senator Ames observed that:

> [e]very large center in the country has become crowded with men whose experience during the war taught them they could by changing their locations better their conditions. This has been invited in every section but the South, where, alas! "carpet-baggers" disturb what remains of that peculiar in-situation, slavery.

GLOBE, p. 570. Representative Kelley deplored

> the madness of the southern Democracy as exhibited in their treatment of the freed men and of northern and other immigrants, and in permitting secret armed societies to intimidate capital and enterprise, and constrain them to remain without her borders or to flee from them after having had the temerity to enter.

GLOBE, p. 338.

Some legislators attempted to convince their southern colleagues that protection of carpetbaggers was desirable because such persons provided capital and organized labor for the rebuilding of the South. GLOBE, App. pp. 251-53 (Rep. Morton); GLOBE, p. 609 (Sen. Poole); GLOBE,

p. 338 (Rep. Kelley). In short, a prime concern in the legislative debates was the protection of the right of "outsiders" to migrate to southern states and do business. GLOBE, p. 368 (Rep. Sheldon); GLOBE, pp. 498-500 (Sen. Frelinghausen).[20] Considering the number of southern congressmen who were themselves recent immigrants, having gone to the South after the war to seek their fortunes, it is not surprising that this was an important concern of the 42nd Congress.

CONCLUSION

Legislative history is a matter to be resorted to only when a statute is ambiguous. The only ambiguity in § 1985(3) relates to the definition of private "equal" protection or "equal" privileges and immunities. This was resolved in *Griffin* by defining those terms as involving a general intent to further a class-based invidiously discriminatory animus. 403 U.S. at 102. Such ambiguity as remains after *Griffin* is surely not of a magnitude to require the kind of analysis engaged in by Petitioners, especially when that analysis substantially misapprehends the legislative history. There is no basis for overruling this Court's clear and persuasive interpretation of the statute in *Griffin v. Breckenridge*.

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20. Interestingly, Senator Frelinghausen specifically mentions craft workers: "the mason or the carpenter of New Jersey may put his chisels or his trowels in his carpet-bag, and go to any part of the land, and say, 'here I will stay in despite of the holy horror of those who cry out, "adventurer!" "scalawag!" "carpetbagger!"'" GLOBE, p. 500.

The Circuit Court correctly applied the principles of a § 1985(3) cause of action as defined in *Griffin* based upon the factual findings of the District Court as to the requisite animus.

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals *en banc* must be affirmed.

Respectfully submitted,

ROBERT Q. KEITH

PROOF OF SERVICE

CERTIFICATE BY BAR MEMBER

I, Robert Q. Keith, attorney of record for Paul E. Scott, James T. Matthews, A.A. Cross, and A.A. Cross Construction Company, Inc., Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 18th day of March, 1983, I served copies of the foregoing Brief for Respondents on Petitioners hereto, as follows: on the United Brotherhood of Carpenters and Joiners of America, Local 610 (AFL-CIO), United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195 (AFL-CIO), and the United Brotherhood of Carpenter and Joiners of America, Local 753 (AFL-CIO), Petitioners, by placing a copy in the United States mail, addressed to their attorney of record as follows:

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